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In the Supreme Court of the United States

OCTOBER TERM, 1940

STANOLIND PIPE LINE COMPANY, a Corporation,
Petitioner,

VERSUS

OKLAHOMA TAX COMMISSION, Composed of J. D. Carmichael, Hubert L. Bolen and J. D. Dunn,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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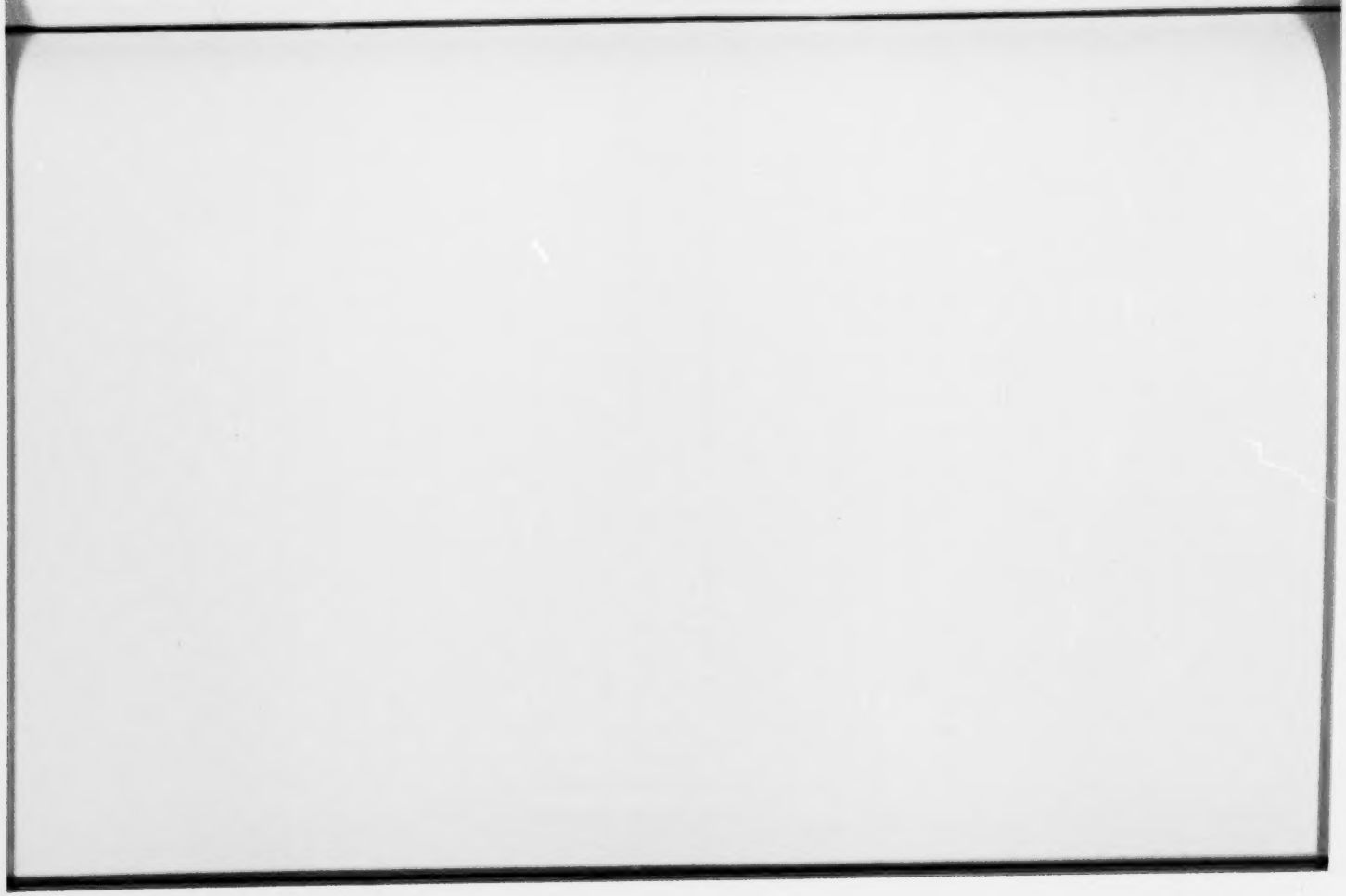

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BRIEF AND ARGUMENT

(Emphasis supplied.)

This case involves the validity of the assessment of a tax against petitioner, under the Oklahoma Use Tax Act of 1937 (Art. 11, Chapter 66, S. L. 1937). This Act appears in full in the appendix to petitioner's brief.

Section 4 of the Act provides:

"There is hereby levied and there shall be collected from every person using, within this State, any article of tangible personal property purchased, leased, rented or exchanged subsequent to the date of passage and approval of this Act, an excise tax for the privilege of so using such tangible personal property. Such

tax shall be and is hereby levied, and shall be collected in an amount equal to two (2%) per centum of the purchase price (as defined in Section 3 of this Act) of such tangible personal property."

The case was submitted to the trial court under stipulation of facts and the pleadings. The facts are fully stated in petitioner's brief and we shall not, in detail, restate them. The facts are, in brief, as follows:

Petitioner is the operator of a pipeline system and is engaged in the State of Oklahoma in the transportation of crude petroleum through and out of the State of Oklahoma exclusively in interstate commerce. Subsequent to the passage of the above Act and between May, 1937, and March, 1939, petitioner purchased certain equipment, consisting of tangible personal property, outside the State of Oklahoma for use in the maintenance, upkeep and repair of its pipeline system. This system was used solely in the conduct of its interstate business. The material imported into the State was installed in its pipeline system immediately after its arrival. It was not retained for any length of time before installation. It was not placed in storage but was, upon its arrival in the State, unloaded and immediately conveyed to the place of installation where it was installed.

The respondent assessed an excise tax equal to two per cent of the purchase price of such material after its arrival in the State. Petitioner contends that the assessment is invalid in that it was a direct tax upon the use of an instrumentality in interstate commerce and, there-

fore, in violation of the Commerce Clause of the Constitution of the United States. It is the contention of respondent that the assessment was made on the use of the property for the purpose of installation, and that the assessment did not attach on such use until after the property arrived in the State, came to rest therein, and before its use in interstate commerce began. The trial court sustained the contention of petitioner and held the assessment invalid (30 Fed. Supp. 131). The Circuit Court of Appeals for the Tenth Circuit, on appeal, reversed the judgment.

It is our contention that the case at bar is controlled by prior decisions of this Court in the cases of *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *Pacific Tel. & Tel. Co.* v. *Gallagher*, 306 U. S. 182; *Nashville C. & St. Louis Ry.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249.

The Circuit Court based its opinion largely on these cases. In the case of Southern Pacific Company v. Gallagher, *supra*, this Court had under consideration a California statute somewhat similar to our statute. The tax was there sustained. The gist of the opinion is set forth in the headnotes as follows:

> "California tax on storage and use—*i. e.*, upon retention and exercise of ownership—may be applied consistently with the commerce clause and the due process clause of the Fourteenth Amendment to an interstate railroad company in respect of supplies purchased outside of the State and brought in for prompt application in the operation of its road, such as office supplies, and rails, equipment, machinery, tools, etc.,

used in replacements, repairs, and extensions, and including articles ordered out of the State on specifications suitable only for use in the transportation facilities and installed immediately upon arrival at the California destination. P. 172.

"There is an interval after the articles have reached the end of their interstate movement and before their consumption in interstate operation has begun when the 'use and storage' are subject to local taxation. *Helson & Randolph* v. *Kentucky*, 279 U. S. 245, distinguished. P. 176."

In that case the Southern Pacific Company, taxpayer, purchased from without the State certain articles of tangible personal property for installation in connection with its interstate railway system. The tax under the statute was levied upon the use, storage, withdrawal from storage and retention of the property within the State. The tax was assessed on the imported articles after their arrival in the State and before installation. It was there contended, as here, that the tax was assessed upon the privilege of using an instrumentality in interstate commerce and, therefore, violated the Commerce Clause of the Constitution. The court denied this contention and, among other things, at page 177, said:

"We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun."

We think this reasoning is applicable here. That case was followed by this Court in the case of *Pacific Tel. & Tel. Company* v. *Gallagher*, 306 U. S. 182. The facts are similar. There the property upon which the use tax was assessed was imported from without the State of California and used in the repair of the company's intermingled interstate and intrastate telephone system. The imported articles were installed immediately upon arrival. There was no retention for any period, nor had the property ever reached storage. This Court, nevertheless, sustained the tax and, in disposing of the question, at page 187, said:

> "The appellant exercises two rights of ownership in California—*retention and installation*—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system began."

We can see no material distinction between the facts in that case and the facts in the case at bar. The same thing was taxed under the California statute as is taxed under the Oklahoma statute. Therefore, the same reasoning and the same rules of law should apply. Petitioner, however, contends that these cases are not controlling because of the distinction between the Oklahoma statute and the California statute. It is pointed out that under the California statute the tax is upon the use, retention, storage and withdrawal from storage, and that the California statute also defines the term "use," whereas such term is not defined by the Oklahoma statute; nor does the Oklahoma statute purport to assess the tax on the storage and withdrawal from storage of the imported articles.

We do not think the mere fact that the statute levies the tax on the use after importation, and not on the storage or withdrawal from storage, is of any controlling importance. In the California cases, *supra*, most of the imported articles were installed immediately upon arrival in the State; they were not retained in the State for any length of time, nor did any major portion of the imported materials ever reach storage. The tax on such materials was solely on the use. This Court, nevertheless, sustained the tax. It, therefore, appears quite clear to us that the Court would have sustained the tax even though the words "storage" or "withdrawal from storage" had been eliminated from the Act.

The California statute also defines the term "use." The statute here involved does not define such term. The word is defined under the California Act as follows:

> " 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

We do not think that this statutory definition gives to the term "use" any unusual or extraordinary meaning. This term, we think, naturally has such meaning and means the same whether so defined by statute or not. Therefore, the mere fact that the California statute defines the term "use" to mean that which it means without statutory definition cannot change the result.

While the Oklahoma statute does not define the term "use," under authority granted the Commission under the

Act, the Commission did define, by its Regulations, the word "use" as follows:

> "The term 'Use' * * * means: The employment of an article of tangible personal property for the accomplishment of a purpose; to make use of; to treat; to convert to one's service; to avail oneself of; to employ for the attainment of some purpose or end."

We contend that there is no substantial difference between the definition given the term "use" under the Regulations of the Oklahoma Tax Commission and that given the term under the statute of California. How can one convert property to his own service, or avail himself of such property? How can it be employed for the attainment of some purpose or end without exercising the right or power over such property incident to the ownership thereof? The property in this case was employed for a purpose—for the purpose of installation. When petitioner employed that property for the purpose of installation it exercised the right or power over such property incident to ownership. For what purpose under the California Act did the company exercise any right or power over the property incident to ownership prior to installation, except for the purpose of installation? None whatever.

Here petitioner employed the property for a purpose—the purpose of installation. There is no difference between the thing taxed under the Oklahoma Act and the thing taxed under the California Act. The question as to the validity of the tax depends upon the thing taxed and not upon the choice of words used in the Act.

Speaking on this question, this Court, in *Southern Pacific Company* v. *Gallagher, supra,* at page 177, said:

> *"State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed."*

This statement is applicable here. As before stated, the thing taxed under the Oklahoma statute is the same as the thing taxed under the California statute. The distinction attempted to be pointed out by counsel for petitioner is, therefore, a distinction without a difference. Speaking on this question the Circuit Court, in its opinion (Tr. 63), says:

> "The company seeks to distinguish this case from Southern Pacific Co. v. Gallagher, and Pacific Tel. & Tel. Co. v. Gallagher, *supra*. The attempted distinction rests upon a supposed substantial difference between the statute and a regulation of Oklahoma and the statute of California. The statute of Oklahoma did not define the term 'use' but it empowered the tax commission to adopt rules and regulations, and by regulations the term was defined to mean 'The employment of an article of tangible personal property for the accomplishment of a purpose; to make use of; to treat; to convert to one's own service; to avail oneself of; to employ for the attainment of some purpose or end.' Section 3 of the statute of California thus defined the term: '"Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business.' See *Southern Pacific Co.* v. *Corbett,* 20 Fed. Supp. 940. The statute of California does not give any unusual or extraordinary meaning to the term, and the definition set

forth in the regulation of the tax commission in Oklahoma does not substantially prescribe its usual and ordinary meaning. The retention and exercise of the right of installation of the property in question after the termination of its movement in interstate commerce and before the beginning of its use and consumption in the interstate business of the company came well within the statute and the regulation promulgated under it."

In this connection, we also call the Court's attention to the case of *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249. There was before the Court in that case the validity of a statute of Wyoming assessing a use tax on gasoline. Under the facts in that case the air transport company transported certain gasoline from other states and stored it in Wyoming. Such gasoline was there withdrawn from storage, placed in airplanes, and used exclusively in interstate commerce. The tax was assailed on the ground that it was assessed upon an instrumentality used in interstate commerce and, therefore, invalid. The Court denied this contention and, in so doing, among other things, said:

"The statute levies a 'license tax of four cents per gallon * * * on all gasoline used or sold in this State * * * for domestic consumption' and requires every 'wholesaler' engaged in the 'sale or use of gasoline' within the State to report to the state treasurer each month all the gasoline 'sold or used' by it in the State, and to pay the tax upon it. Gasoline 'exported or sold for exportation from the State' is exempted from the tax. A 'wholesaler' is defined as any person (1) who 'imports or causes to be imported gasoline

* * * for sale in the State * * * to the jobber or consumer, or to the persons * * * who, in turn, sell to the jobber or consumer,' or (2) who 'produces, refines, manufactures, blends or compounds gasoline,' in Wyoming 'for use, sale or distribution in this State.' In addition the statute provides that 'every person * * * who shall use any gasoline in this State upon which the said tax has not been paid by any wholesaler in this State,' shall render a like statement and pay a like tax.

* * * * * * * *

"As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the State and therefore subject to the tax, when it is withdrawn form the tanks. Compare, *Nashville, Chattanooga & St. L. Ry.* v. *Wallace, supra.* * * * *There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to * * * ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson* v. *Kentucky,'* 279 U. S. 245. *As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.*

"Despite the fact that the statute as applied is identical in operation with that sustained in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra, respondent contends that as the statute is written, the tax is one on the consumption of gasoline in propelling its airplanes in interstate commerce, invalid under Helson* v. *Kentucky, supra.* In that case a Kentucky statute taxing the use of gasoline was applied to that purchased and placed in the tanks of a ferry boat outside the State for use in operating it in interstate commerce. The tax, which is levied only with respect to gasoline consumed while the ferry boat was within the State, was held to be invalid as, in effect, a direct tax on the privilege of carrying on interstate commerce."

It will be noticed in the above case that the Wyoming statute did not levy the tax on storage or withdrawal from storage. The tax was assessed on the use of the gasoline, just as the tax here involved is assessed on use. The Wyoming statute did not define the term "use." The contention was made there, as here, that the tax was on the use and that under the statute as written, the tax was on the consumption of gasoline used in propelling airplanes in interstate commerce and, therefore, invalid. The Court denied this contention and, quoting from the case of *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, the Court said:

"*There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson* v. *Kentucky,'* 279 U. S. 245. *As the exercise of the*

powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations."

In the above case the term "use" was not defined by statute. The Court nevertheless held that the term "use" implied the exercise of a right or power incident to the ownership of the property. We think this case sustains our contention that the word "use" means the exercise of a right or power incident to the ownership of property without a statutory definition to that effect. Therefore, when petitioner employed the imported articles for a purpose—the purpose of installation—under the decision in the above case, it exercised a right or power incident to the ownership of the property, and we think that the Court was clearly correct in so holding.

Counsel for petitioner further contend that it was not the intention of the Legislature under the 1937 Use Tax Act to lay a tax upon property or events prior to the commencement of interstate commerce. This contention is based on the fact that the Use Tax Act was revised by the Legislature in 1939 (Art. 12, Chapter 66, S. L. 1939). In that revision the term "use" is defined exactly as the term is denied in the California Act.

Subdivision (h) of Section 1 of the Act defines "use" as follows:

"The term 'use' means and includes the exercise of any right or power over tangible personal prop-

> erty incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Counsel contend that this change in the revised Act of 1939 amounts to a legislative declaration that the term "use" could not be so defined under the old statute. This contention is based on the rule that the change in phraseology of an old statute by way of amendment creates a presumption of a change in legislative intent. This rule, however, has little if any force in changes of the character here involved. The rule is quite frequently followed where there is an amendment of a particular section of an old statute, where it is apparent that the amendment is made to cure a defect in the old law. It has very little force or effect in cases of this character where there is an entire revision of an Act. Nor has it any force where it is apparent that the change was made to express more clearly the original legislative intent. It must be borne in mind in this case that in making the revision, the Legislature in no way changed its prior definition of the word "use." This term was not at all defined in the old statute. Therefore, we think it apparent that the change was made for the purpose and with the intent to clearly define the term "use," rather than to indicate a legislative declaration that the term had no such meaning in the prior Act.

Speaking on this question, the Circuit Court, in its opinion (Tr. 64), said:

> "Thus the definitive provision of the statute in Oklahoma is identical with that contained in the statute of California. The argument is that the new

act demonstrated a legislative intent to make a substantial change in the then existing law; that it recognized a substantial difference between the tax levied by the two statutes; that it recognized the fact that the earlier act was not as comprehensive as the statute in California; and that taking notice of the decisions in Southern Pacific Company v. Gallagher, and Pacific Telephone & Telegraph Co. v. Gallagher, *supra*, it sought to change the statute to conform to that in California. It is a general rule of construction that by amending a statute the Legislature intended to make a substantial change in the preéxisting law. But like others, that rule has its exceptions. It is not every change in phraseology that indicates a desired change in substance and effect. It may be made for the purpose of expressing more clearly and accurately the same intent or to improve diction. Or it may be to meet a new and unanticipated condition brought about by judicial interpretation of the pre-existing law. And while the presumption to effect a change in substance is fairly strong in the case of an isolated, independent amendment, it has much less persuasive force in a case of this kind where the new enactment is a general comprehensive tax code. *State* v. *Wibaux County Bank*, 85 Mont. 532, 281 Pac. 341, certiorari denied, 281 U. S. 725. The case of *Pacific Telephone & Telegraph Co.* v. *Henneford, supra,* was decided in 1938, and the cases of *Southern Pacific Co.* v. *Gallagher,* and *Pacific Telephone & Telegraph Co.* v. *Gallagher, supra,* were decided early in 1939. We are unable to say that the enactment of the statute in 1939 indicated a legislative intent and understanding that the Act of 1937 was not sufficiently comprehensive in scope to impose an excise upon imported tangible property where retention and attributes of ownership were exercised over it between the termination

of its movement in interstate commerce and the beginning of its use and consumption in a business which is interstate in character. Instead, it is a reasonable presumption that the decisions in the three cases came to the attention of the Legislature at its session in 1939 and that to make assurance doubly sure the statute was thereupon amended in such manner as to bring it into parallelism with that in California. Rather than pointing to a legislative intent that the Act of 1937 did not warrant the laying of the tax now in dispute, the enactment of the subsequent act is indicative of a determined intent and purpose from the outset that the tax should be levied."

It is not our purpose at this time to enlarge upon what is there said. Suffice it to say that we are content, for the purpose of this brief, to rely thereon.

Counsel further contend that if the Act be construed as we contend it should be, then the tax here assessed is an ad valorem tax and is laid in violation of Article 10, Section 9 of the Constitution of the State of Oklahoma, as amended August 15, 1933, which provides that no ad valorem tax shall be levied for state purposes. The tax, however, in no event can be construed as an ad valorem tax. The nature of the tax was passed upon by the Supreme Court of the State in the case of *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother,* 186 Okla. 339, 97 Pac. (2d) 888.

The court in that case held the 1937 Use Tax an excise tax and, in discussing the nature of the tax, said:

"It is an excise tax which the state is authorized to exact, and in connection with the 'Consumers Tax

> Act' it has for its primary purpose raising revenue for state purposes. It is particularly designed to prevent consumers escaping payment of the sales tax by going outside the state and purchasing tangible personal property in any one month in excess of the value of $100, and bringing same into the state for their use or consumption."

Counsel, however, contend that if the tax be construed as an excise tax, it is clearly unconstitutional. In answer to this contention we call the Court's attention to the fact that in the case of Edelman v. Boeing Air Transport, Inc., *supra,* this Court treated the tax as an excise tax. The tax there, as here, was on the use. The term "use" was not defined by the Act. The Court nevertheless sustained the assessment. We think the facts in that case are identical with the facts in this case and completely answer the contention of counsel that if the tax be an excise tax, the assessment is invalid.

Most of the cases relied upon by counsel for petitioner were distinguished by the Circuit Court in its opinion, and were likewise distinguished by this Court in the cases herein cited and relied upon.

Counsel place great stress on the case of *Pacific Telephone & Telegraph Company* v. *Henneford,* 195 Wash. 553, 81 Pac. (2d) 786. This case apparently sustains their contention. The opinion, however, we think in conflict with the opinions of this Court in the cases herein cited and is, therefore, not controlling. Counsel also call attention to the fact that this Court denied certiorari in the above case (306 U. S. 673). We do not think any im-

portance should be placed on the fact that this Court refused to review the decision of the Supreme Court of Washington in that case. It was not necessary to a decision that the State Supreme Court should have decided the Federal question there involved.

It was also contended in that case that the Washington Act levied a compensating tax; that the property sought to be taxed under the Act could not be procured or purchased within the State of Washington; and that the Act in question did not levy a use tax on such property. After having decided that the Act in question did not levy a use tax on the use of the property therein involved, it was not necessary to pass upon the Federal question as a decision in favor of the company on the State question involved effectively disposed of the case. Therefore, even though this Court had granted certiorari and at final hearing arrived at a different conclusion from the Washington court on the Federal question, it would have availed the State nothing, as the State would still have been precluded from collecting the tax because of the conclusion reached by the Supreme Court of the State on the State question.

In these circumstances this Court invariably refuses to assume jurisdiction and review the case. We, therefore, contend that the fact that certiorari was denied is not even persuasive here, much less controlling. The above case, however, as to the State question decided, was subsequently overruled by the Supreme Court of Washington in the case of *City of Spokane* v. *Washington*,

89 Pac. (2d) 426. The Federal question, however, discussed in the former case, was not discussed in this case. The case was overruled only as to the State question involved. However, the original opinion was still in full force and effect at the time this Court denied certiorari.

We submit that the Circuit Court of Appeals for the Tenth Circuit arrived at the correct conclusion and the writ should be denied.

Respectfully submitted,

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